IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 20,106

GREAT WESTERN BROADCASTING CORPORATION
d/b/a KXTV, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Supplemental Petition to Review Supplemental Decision of the National Labor Relations Board

BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER

NATIONAL ASSOCIATION OF BROADCASTERS
DOUGLAS A. ANELLO
GORDON C. COFFMAN
Counsel
1771 N Street, N. W.
Washington, D. C. 20036

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This brief is filed with the written consent of the parties hereto, pursuant to rule 18(9)(a) of this Court. It is in support of the position of the Petitioner, Great Western Broadcasting Corp., d/b/a KXTV, and is in

opposition to the Supplemental Decision of the National Labor Relations Board issued on December 16, 1964, in response to this Court's decree of December 17, 1962, entered in the prior proceeding herein identified on the Court's records as No. 17,698.

INTEREST OF AMICUS CURIAE

The National Association of Broadcasters (hereinafter called the Association) is a non-profit organization of radio and television broadcasters whose membership included as of November 3, 1965, 2135 AM stations, 915 FM stations, 455 Television stations, and all of the nation-wide radio and television networks. This brief is submitted in furtherance of the objective of the Association which, in accordance with its by-laws,

> "... shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustice and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public."

In the area of labor-management relations, the secondary boycott is of prime concern to broadcasters. The secondary boycott restrains and coerces broadcast stations through unfair economic pressure and seriously impairs their ability to pursue their legitimate business interests. Frequently, the economic injury suffered from a secondary boycott is far more lasting than the effects of a primary labor dispute. Thus, the Association has supported over the years numerous Congressional efforts to enact remedial boycott legislation and endorsed the enactment of the present secondary boycott sections of the Labor Management Relations Act of 1947, as amended in 1959 (herein-

after called the "Act").[1] It is the position of the Association that, through this legislation Congress has intentionally and effectively proscribed secondary boycotts of the nature here involved.

STATEMENT OF THE CASE

The pertinent facts are fully stated in this Court's decision in Case No. 17,698 (310 F.2d 591). They are also summarized in the briefs of Petitioner and the Board and, therefore, need not be repeated here.

The basic issue before the Court is whether the Unions' consumer boycott activities with respect to advertisers in connection with their strike against Petitioner are protected by the proviso to Section 8(b)(4) of the Act.

The Association supports and adopts the arguments of the Petitioner as expressed both in its main and reply briefs. The basic purpose of this brief is to demonstrate that if there are products of a broadcaster which would satisfy the requirements of the Act, they are the programs put together and broadcast over his station's facilities and not the products *advertised* over those facilities.

ARGUMENT

KXTV's Only Products Were the Programs Distributed Over Its Facilities to the General Public and Were Neither Handled Nor Distributed by KXTV's Advertisers

As stated in Petitioner's main brief (pp. 13-14) the Supreme Court in *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46, did not suggest, nor did it imply, that a television station, or any other advertising medium, was a producer of the products advertised through its facilities. What products are produced are its programs.

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[1] 61 Stat. 140, as amended in 1959, 73 Stat. 525, 29 U.S.C. 158.

In both of the cases relied upon by the Board[2] there were tangible products capable of distribution. The primary dispute in both instances was with the distributor of that product. The product which is a primary aspect of the dispute can be followed. On the other hand, where a primary employer provides only a service, not directly handling the product, there is nothing to be followed. The actual performance of the service is the only primary aspect involved, and this cannot be "distributed" by another employer. Thus, *Servette* and *Tree Fruits* continue the limitations of the proviso to 8(b)(4) of the Act to situations involving secondary boycotts where there is a forward flow of a product from the primary employer to the secondary employers.

When an advertiser engages the services of broadcast stations, there is no flow of product from the station to the advertiser. At this point there is no station product. Therefore, any publicity directed against an advertiser who uses the services of a broadcast station which has a primary dispute with a union to require him to stop doing business with the broadcast station, is a prohibited secondary boycott in its purest form as spelled out in Section 8(b)(4) of the Act.

This is not to say, however, that there is not a product connected with the activities of a broadcaster, and one which might have been boycotted by the unions had they chosen to do so. Radio and television stations produce very important products—programs. This product is not unlike that of other advertising media such as newspapers and magazines. It is the result of the physical efforts of the employees of a broadcasting company, just as newspapers and magazines are products of the employers who produce them.

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2 *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46 and *N.L.R.B.* v. *Fruit and Vegetable Packers and Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58.

However, a radio or television station differs in one very important respect from other advertising media. Radio and television stations, because of the peculiar nature of the air waves with which they operate, could not be allowed to develop helter-skelter solely on the basis of free enterprise. Congress determined at an early date that stations would first have to secure a license from a regulatory body established for that purpose to insure the orderly development of nationwide communications.[3] The primary concern today of the Federal Communications Commission in granting licenses to applicants is the way in which the applicant intends to operate in the "public interest, convenience, and necessity."[4]

The courts have, on numerous occasions, been called upon to determine the scope of the FCC's authority to define what is in the public interest. In each instance, it is evident that an important factor in that determination is the programming policy of each individual station. In comparative hearings involving two or more applicants for the same facility, the Federal Communications Commission cannot prescribe any type of program, but it can and does make a comparison on the basis of public interest, and, therefore, public service. In *Johnston Broadcasting Company* v. *Federal Communications Commission,* 175 F.2d 351, the Court said at page 359:

"But in a comparative consideration, it is well recognized that comparative service is the vital element, *and programs are the essence of that service*"[5] (Emphasis added).

It can thus be seen that the FCC recognizes the program to be the essential element of public interest and, therefore, the reason why radio and television stations

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[3] 48 Stat. 1081, 47 U.S.C. 301.

[4] 48 Stat. 1083, as amended in 1962, 76 Stat. 58, 47 U.S.C. 307(a).

[5] See also: *National Broadcasting Co.* v. *United States,* 1943, 319 U.S. 190, 63 S. Ct. 997, 87 L. Ed. 1344; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 1940, 309 U.S. 134, 138 n. 2, 60 S. Ct. 437, 84 L. Ed. 656.

are allowed exclusive use of a particular frequency within a specific, prescribed area. It can be said, then, that broadcast stations provide the public with an essential product, the program.

Another recognition of the program as the product of a broadcaster is found in the Communications Act itself. Section 325(a) provides in part: ". . . nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station."[6]

The Congressional intent to preserve the property rights of the broadcasters was clearly spelled out in the enactment of Section 325(a). It recognized without equivocation the rights of a radio station in its programming. This is apparent from the following statement made by Senator Clarence C. Dill during floor debate on Section 28 of H.R. 9971[7]:

> "As to Section 28, providing that no person, firm, or corporation shall rebroadcast the material broadcast by a station without the station's consent, it is, I think, a very necessary provision. Otherwise we would have a broadcasting station spending a large amount of money to prepare and present a program as a program from that station, and then under the modern methods of rebroadcasting, it could be picked up and broadcast from the other stations . . ."[8]

The authors of the Radio Act of 1927 then, by providing protection for the program of one broadcaster as against unauthorized use by another broadcaster, were acknowledging the program as the product of a broadcaster's labor.

A radio or television station prepares and distributes over its facilities programs identifiable as to content and

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6 48 Stat. 1091, 47 U.S.C. 325 (a).

7 Section 28 of H.R. 9971 was enacted as Section 28 of the Radio Act of 1927 and ultimately re-enacted as Section 325(a) of the Communications Act of 1934.

8 68 Cong. Rec. 2880 (1927).

length. Many stations spend great amounts of time and money to secure the right personnel who possess the special qualities needed to provide a unique service to the public. The programs, then, made up by co-ordinating the efforts of many individuals such as technicians, administrative personnel, directors, and performers, result in a product which is unique from all others.

This product, like a newspaper, is distributed to the public. A consumers' boycott of a radio or television program might be accomplished by direct appeal to the public informing them of the labor dispute and urging their assistance by not listening to the programs of the station in question.

That advertising was not to be, in and of itself, the primary object of broadcasting was emphasized early in the era of radio regulation:

> "While it is true that broadcasting stations in this country are for the most part supported or partially supported by advertisers, broadcasting stations are not given these great privileges by the United States Government for the primary benefit of advertisers. Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public . . . Advertising should be only incidental to some real service rendered to the public, *and not the main object of a program*"[9] (Emphasis added).

Thus the advertising message of a sponsor is only an ingredient of the broadcaster's product. In other words, the program is the product and advertising is merely an element thereof. The proviso here in question applies only to the end product, the program, going forward and may not be applied backwards to reach the elements of the product. To apply the proviso to a boycott of the advertisers in this situation would be as erroneous as applying it to a boycott of a wheat mill where the primary dispute

[9] 2 Fed. Radio Commission Ann. Rep. 168 (1928).

was with the manufacturer of a cake mix which utilizes the raw flour of the wheat mill in its cake mix.

In the case at issue, the advertisers were not the people handling or distributing KXTV's products, the programs; therefore, the proviso would not protect the Unions' activity.

CONCLUSION

Wherefore the Court should set aside the Board's Supplemental Decision, reverse the order of dismissal, and either enter a decree adopting the Recommended Order of the Trial Examiner or remand the matter to the Board for entry of an order consistent with this Court's legal conclusions in No. 17,698.

Respectfully submitted,

National Association of Broadcasters
1771 N Street, N. W.
Washington, D. C. 20036

Douglas A. Anello
Gordon C. Coffman
Counsel

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Gordon C. Coffman

November 9, 1965